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No. 671

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1966.

ALBERT C. DROSTE,

Appellant,

vs.

OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF ILLINOIS

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS

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Statement of the issue.—

In respect to the important public question here, of the limitations on state power to grant away submerged Great Lakes lands, appellees' motions to dismiss make two

points which in fact serve to establish this appeal. They say that (1) appellant was not specific enough in his federal claims below, and (2) the public trust doctrine is entirely a matter of local law.

A mere glance at pages 450-462 of the decision of this Court in *Illinois Central R. Co.* v. *Illinois,* 146 U.S. 387, will suffice to show that either that decision is wrong or appellees are wrong in their contentions—the very conflict which this appeal seeks to have settled.

This Court was there plainly not declaring Illinois law, but rather, what it considered to be fundamental limitations on the police power of the State of Illinois, which was held not competent to breach or abdicate the public trust of Lake Michigan submerged lands by attempted enactment of a statute very similar to the one here in issue.

This federal decision by the highest Court in the land stands as the law of the land and is the very matter which, under the arguments of both sides here, is chiefly in issue. This appeal is to test a similar exercise of legislative power by the State of Illinois as against the doctrine of that federal decision. No clearer basis for this Court's jurisdiction could appear.

The alleged lack of specificity of federal claim below.—

This is a direct function of the fact that the decision in 146 U.S. is itself federal law relied upon; and, that decision failed to be any more specific than was appellant below in citing the particular provisions of basic federal law which invalidate the kind of exercise of state police power here in question. Appellant ventured below to specify the XIVth Amendment, which was clearly ade-

quate to make the point since the decision below expressly decides the due process issue. (R. II, 194). The fact of such express decision disposes, in itself, of appellees' motions to dismiss—unless this Court can somehow be prevailed on to conceive of the Illinois Supreme Court as so provincial that it does not consider the XIVth Amendment to be involved in an express decision on "due process."

The "local law" claim.—

If the underlying limitations stated in 146 U.S. on the power of the State legislature to convey this public trust property are now to be deemed a matter of "local law," only this Court can authoritatively so declare; and appellees' contention to this effect is thus a reason why review should be had in this case.

We take the statement as to "local law" in *Illinois Central Railroad Co.* v. *Chicago,* 176 U.S. 646, 659, to be as we presented it below, namely, as concerning the extension by the Illinois Supreme Court of the underlying federal protection established in 146 U.S. to the further point of absolutely proscribing any grant (however small in size) of this public trust property for private, non-navigational uses:

> "It is true that the State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery.
>
> • • •
>
> It is not proposed here, to take or appropriate the land in question [4.4 acres] for the erection of wharves, docks or piers, the construction of which may facilitate or aid the navigation of the waters of the lake, but the sole purpose seems to be to appropri-

ate the submerged land for the private use of the railroad company." *(Illinois Railroad Co.* v. *Chicago,* 173 Ill. 471, 485, 487).

It was the above special rule of local protection which was the matter on appeal in—and referred to in appellees' quotation from—this Court's decision in 176 U.S. (The *Kirk* case, 162 Ill. 138, mentioned in the same quotation, involved the opposite facet of this local rule—a statute enacted for the *public* purpose of building a lake shore parkway.)

This special, more absolute rule of trusteeship, going beyond the broad underlying federal criteria of protection stated in 146 U.S., was, indeed, the point most thoroughly argued below—because it specifically and unequivocally read on the statute in question, which is nothing more nor less than a special grant for private industrial purposes.

That the Illinois court, in its unexpected third and final decision below, repudiated its own rule of extended local protection to this public trust means that its express retreat to the broader lines of the underlying federal protection provides this Court with a clear basis for jurisdiction to determine the basic issue in this case—whether the court below has, as appellant contends and appellees deny, substantially misapplied that federal doctrine in this case.

The standing-to-sue question.—

Appellees' argument on this point is really based on the same assumption that no federal question is presented by the express reliance by the court below, in deciding the merits, on the public trust doctrine established by this Court in 146 U.S. If a federal question is presented by that decision (as it clearly appears to be),

the matter of the State's denial of standing to raise that question is a matter of federal law which this Court can, and should, consider.

Just as the decision in 146 U.S.—to which the Illinois Court has returned—denies the very specificity of constitutional claim on the merits which appellees now assert should have been presented from the very first, so does their claim fall of its own weight that the constitutional issues raised by appellant's being denied standing to sue should have been more specifically pleaded. A plaintiff does not come into court alleging that he has no standing to sue (and that this is unconstitutional for such and such reasons, etc.). The trial court denied appellees' motion to dismiss for lack of standing and, after the intervention of the Steel Company, there was no reason to expect that the question of standing was of any further significance. In any event, the second opinion below, by an eminent judge, Mr. Justice Schaefer, seemed to have settled that matter for good.

It cannot be gainsaid that the final reversal of itself by the Illinois court below, both on standing-to-sue and on the merits, was, in respect to the very matters presented by this appeal, unexpected and unexpectable and that appellant has done what he could to meet the vagaries of the judicial decisional process as manifested in this unusual case.

Public policy and the importance of this appeal.—

The basic policy in concern is the federal protection of an acknowledged public trust of Great Lakes submerged lands which is here plainly subverted by special, private usurpation. Rationalizing a political power play as legislative policy-making with which the judiciary

should not interfere is no answer to the limitations on legislative action already set by judicial decision many decades ago. It is those limitations, based on the law of the land established by this Court, that appellant seeks to enforce. We repeat that the heritage of millions of people in the Great Lakes region is here at stake, for if Illinois can grant away its lakefront to private use by means of special statute favoring only one named industrial company and calling for the abrogation of a long-standing grant of this property to a municipal corporation for public recreational use, there is no future protection of the public trust left.

Appellees concede that "gross" perversions of what they euphemistically continue to describe as the public trust are subject to judicial invalidation. The instant perversion is the most "gross" of all, for it effectively destroys every vestige of a *public* trust.

Conclusion.—

It is respectfully submitted that the appellees' motions (not joined in by the Chicago Park District) to dismiss this appeal should be denied and that this Court should review the important question of public conservation of our great natural waterways here presented, either by appeal or, alternatively, by granting certiorari.

Respectfully submitted,

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END